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Supreme Court, U.S.
FILED
NOV 5 - 2008
OFFICE OF THE CLERK

No. 08-404

IN THE

Supreme Court of the United States

DARLETA ROCHELLE JOHNSON,

Petitioner,

v.

TRANSIT MIX CONCRETE & MATERIALS CO. AND TRINITY MATERIALS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Texas Court of Appeals for the Eleventh District

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents' brief misapprehends the issue presented to this Court,[1] argues vigorously against positions Petitioner has not taken, and cherry-picks passages from the briefs below to claim the federal issue was not presented prior to the petition for rehearing in the Texas Supreme Court. A review of the record, however, plainly demonstrates that the relevant federal law and regulations were presented at trial and in each appellate review. It was consistently asserted that the federal regulations inform the application of Texas negligence law. On the basis of that record, the jury found Respondent negligent for Brad Johnson's death. Contrary to the contention advanced in Respondent's brief, nothing further was required of Petitioner – not a jury instruction that incorporated the federal regulations and not a separate and distinct cause of action based on federal law. Notably, no where in the Brief in Opposition do Respondents claim that mandatory federal safety standards, the centerpiece of the Petition and the case as presented below, are irrelevant to the determination of liability in this case.

Respondents (collectively referred to in Respondents' brief as "Trinity," as it will be here) premise their opposition to the Petition for a Writ of Certiorari in this case on two interrelated but false premises. First, Respondent erroneously asserts that no federal issue was presented below so that this Court lacks jurisdiction. Opp. 10-19. Second, Respondents set up a straw-man argument when

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[1] In fact, it fails to include the Question Presented by the Petition.

they assert that the Federal Mine Safety and Health Act, 30 U.S.C. § 801 *et seq.*, does not require states to create a cause of action based on its violation. Opp. 19-22. Because both arguments are advanced on false assumptions, they are unavailing.

I. THE RELEVANT FEDERAL LAW WAS PRESENTED BELOW

Contrary to Respondent's claim, the federal issue was fully presented at trial, before the Court of Appeals, and the original petition to the Texas Supreme Court.[2] At trial, extensive testimony and evidence was presented about federally promulgated mandatory safety standards and the requirement that even independent contractors be trained by the mine's operator. All Trinity officials and employees testified that the regulations of the federal Mine Safety and Health Administration ("MSHA") governed Trinity's conduct. Because there was no dispute about the controlling role of those regulations, the trial court even excluded testimony by a Trinity expert on whether the MSHA regulations applied because Congress had not appropriated funding.

The federal Mine Safety and Health Administration Act and relevant regulations were introduced into the record. (5 RR 192, 198, 200-204). Perhaps more critically, testimony at trial established that Trinity adopted the MSHA Safety and Training Regulations as its own safety program.

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[2] Respondent concedes that the timely petition for rehearing in the Texas Supreme Court raised the federal issue. Opp. 6-7.

For example, Trinity's environmental and mine safety manager was asked:

> Q. "[C]an we agree that MSHA is the authority on regulating the mining industry?
>
> A. Yes, sir.
>
> Q. And can we also agree that the MSHA regulations are the standard in the mining industry?
>
> A. Yes, sir.
>
> * * *
>
> Q. . . . the Part 48 and the Part 56 [of the MSHA] regulations applied to the mine, to Plant 174; is that correct?
>
> A. Yes.
>
> Q. And they are – and MSHA, again is the – authority in the area of mining regulations; is that correct?
>
> A. Yes, sir.
>
> Q. And these MSHA regulations create a standard by which Trinity [Transit Mix] must comply while running a mine; is that correct?
>
> A. Yes.

> Q. And that would include Plant 174, the location where this explosion occurred; is that right?
>
> A. Yes, sir.

(4 RR 11-12). Similar testimony was elicited from Haywood Walker, Trinity's Vice President (4 RR 137); Charles Latiolais, Trinity's corporate safety director (4 RR 216); Robert Farmer, Trinity's acting supervisor on the day of the explosion (4 RR 241); Arturo Munoz, Trinity's human resources and safety manager (5 RR 85-86); and Robert Villa, Trinity's plant manager (6 RR 177).

The "Fatalgram" informing mines of the April 1998 death of a worker from an explosion caused by applying heat to a tire rim and warning against the practice, received by Trinity less than a year before Johnson's death that was caused by the same procedure warned against, was also received into evidence. (PX 28, 29). Trinity's policies require it to read and act on those advisories in order "to prevent these fatalities." (3 RR 11-12, 25-26; 4 RR 13-14; PX 5).

Trinity's Andrews and Walker testified that had they heeded the warnings and provided the MSHA-required training, the explosion would not have occurred and Johnson would not have perished. (3 RR 14-15; 4 RR 53-56, 114-15, 119, 165).

Without question, the jury had a fair opportunity to consider the MSHA regulations and Trinity's failure to comply with its duty to train and specifically found Respondents' negligence proximately caused Johnson's death. Pet. App. 8a-9a.

No more was required to present and preserve the federal issue at trial. All control and negligence issues were before the jury, as the second question posed to the jury defined "negligence" as "the failure to use ordinary care with regard to the exercise of control, if any, over the work activity of BRAD JOHNSON, SR. that caused his death." (3 SCR 34). The jury's affirmative answer to that question was sufficient to cover the failure to comply with mandatory safety standards under federal law. Regardless of whether the jury actually relied on the MSHA regulations to conclude that Trinity was negligent, a Texas appellate court "must uphold a correct lower court judgment on any legal theory before it, even if the court gives an incorrect reason for its judgment." *Guaranty County Mut. Ins. Co. v. Reyna*, 709 S.W.2d 647, 648 (Tex. 1986), citing *Gulf Land Co. v. Atlantic Refining Co.*, 131 S.W.2d 73, 84 (Tex. 1939). As long as the record provides a basis, any legal theory to sustain the judgment is sufficient. *Id.* Thus, the issue was properly before the Court of Appeals.

Nonetheless, that court reversed the judgment on the basis that no duty was owed to Johnson as the employee of an independent contractor. Pet. App. 5a-6a. In doing so, the court focused solely on the evidence of whether Trinity controlled Johnson's actions, separate and apart from any way that the federal standards informed that inquiry. It did so by ignoring the citation of and argument on those federal standards in Petitioner's brief, which devoted pages 21-23 to "Trinity's Duty To Implement MSHA's Directives" and "Trinity's Duty To Ensure Contractors Comply With MSHA." *See* App. 1a-5a.

Trinity argued in the Court of Appeals against application of the MSHA regulations, asserting that the regulations do not set the standard of care for mine operators because Congress had frozen appropriations for them. Without conceding that the appropriations issue was determinative, Petitioner responded that the status of the federal appropriation was rendered moot by Trinity's adoption of the regulations as Trinity's own safety program. Appellee's Brief, Tex. Ct. of App. 31. Moreover, Trinity argued that Petitioner's expert, a long-time employee of the United States Bureau of Mines, should have been excluded because he "largely gave opinion testimony on duties imposed by federal regulations." *See id.* at 32. It is clear that Petitioner fully preserved the issue now presented to this Court.

In light of its decision that the evidence was insufficient to establish any duty on Trinity's part, the failure of the Court of Appeals to discuss the testimony or evidence relating to the MSHA regulations can only be read as accepting Trinity's argument that federal law was irrelevant to the determination of duty or suspended while appropriations were frozen. Equally relevant to the preservation issue, Petitioner engaged in an extensive discussion of the applicable federal law and how it informs the state liability inquiry in the petition for review to the Texas Supreme Court. *See* Pet. for Review 7-9, 13.

In sum, the MSHA regulations were asserted throughout this litigation. There is no basis in the record for Trinity's claim that the federal issue was never presented below.

II. MSHA REGULATIONS INFORM THE NEGLIGENCE INQUIRY

Trinity misconstrues Petitioner's argument regarding the preemptive effect of MSHA and its regulations, and thus misses the point entirely when it contends that "States are not obligated to create tort causes of action for violations of federal regulations." Opp. 20, 21. Petitioner does not argue that MSHA requires States to create a cause of action for violations of its federal health and safety standards. Nor, as Respondent contends, does Petitioner argue that the Court's holding in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), so requires.

Rather, Petitioner maintains that MSHA sets forth a duty that went unrecognized by the Texas Court of Appeals in this case. The existence and scope of duty is a question of law, not a question of fact. *See Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). *See also Kim v. Budget Rent A Car Sys., Inc.*, 15 P.3d 1283, 1285 (Wash. 2001); *Keller v. Koca*, 111 P.3d 445, 448 (Colo. 2005); *Elliott v. Schoolcraft*, 576 S.E.2d 796, 804 (W. Va. 2002). Here, the Texas Court of Appeals' and Trinity's focus on whether the *facts* establish a state law duty, *see* Opp. 1 ("Petitioner presented at trial no evidence to support a duty under a state law claim"), is irrelevant, even if it were true, because the duty was established pursuant to federal law.

As the Petition demonstrates at length, *see* Pet. 8-12, 15-19, MSHA imposes upon a mine's owner-operator a nondelegable duty to follow mandatory safety standards promulgated under the Act's authority. Where state tort law already provides for mine owner-operator liability, as Texas does in

wrongful death and personal injury actions, the standards for determining duty and breach of that duty cannot be less stringent than those established pursuant to the MSHA regulations.

Where federal law provides minimum standards, any state law that fails to meet those standards are preempted. *See, e.g., Hayward v. Jack's Pharmacy Inc.*, 115 P.3d 713, 719 (Idaho 2005) (holding that in cases where federal laws or regulations set forth minimum requirements for licensure of health care providers, like the Social Security Act does, *see* 42 U.S.C. § 1396r, local communities are not free to adopt lower standards because it would thwart the purpose of the federal regulation), citing *Grover v. Smith*, 46 P.3d 1105, 1110 (Idaho 2002); *Bliss v. Stow Mills, Inc.*, 786 A.2d 815 (N.H. 2001) (the federal Surface Transportation and Assistance Act of 1982 (STAA), codified at 49 U.S.C. §§ 31101 *et seq.*, establishes minimum standards, and allows for state tort liability that provides equal or greater protections against retaliatory discharge).

Although federal law may provide the applicable standard of care, traditional state tort law remedies may be used to enforce those standards. *See, e.g., Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999) (holding that federal law establishes the standards of care for air safety, but, despite federal preemption of the standards of care, traditional State and Territorial law damage remedies continue to exist for violation of those standards); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (recognizing that the Nuclear Regulatory Commission's exclusive authority to set safety standards did not foreclose the use of state tort remedies for violations of those standards).

In *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495, 513 (1996), this Court was unanimous on the proposition that state law damages remedies can be used to enforce the federal standards of care created by the Medical Devices Amendments. Thus, while a finding of preemption eliminates the application of inconsistent state tort standards of conduct, Congress' intent to preempt is preserved when federal standards of conduct (or consistent state standards) are applied.

Texas courts have suggested precisely the same thing. In *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 357 (Tex. 1998) (per curiam), the Texas Supreme Court recognized that an employer aware that an independent contractor "routinely ignores applicable federal guidelines and standard company policies related to safety may owe a duty to require corrective measures to be taken or to cancel the contract." *Id.* at 357. In such instances, the employer owes the contractor's employees "a duty that any safety requirements and procedures it promulgated did not unreasonably increase, rather than decrease, the probability and severity of injury." *Id.* at 358. If requiring compliance with federal and corporate safety standards can give rise to liability under Texas law, then surely a duty applies and liability is appropriate where the federal law makes the duty owed nondelegable, where those federal safety standards were adopted as corporate policy, and where the employer, but not the independent contractor, has knowledge of those standards and of advisories such as the "Fatalgram" relevant here. *Cf.* Restatement (Second) of Torts § 424 (recognizing that a statute or regulation that specifies "safeguards or precautions for the safety of others" can be the basis for tort liability to others "caused by

the failure of a contractor employed by him to provide such safeguards or precautions."); *id.* at § 428 (imposing employer liability for injuries to independent contractor employee where the activity is carried out "only under a franchise granted by public authority and which involves an unreasonable risk of harm to others.").

It is irrelevant as well, as Respondent asserts, that MSHA has its own enforcement mechanisms. Opp. 20. Trinity does not argue, nor could it argue, that MSHA provides the exclusive remedy for its violations. Trinity cites no legislative text or history demonstrating that Congress intended to forbid states from providing remedies for MSHA violations and the conflict in state courts over the gravitational pull that MSHA regulations should exert in state tort cases advises in favor of granting this Petition. *See* Pet. 13-17 (detailing conflict). Instead, Congress plainly anticipated the exercise of state authority here. The Act's preemption and the savings clauses explicitly provide that state laws that impose stricter standards are not preempted. 30 U.S.C. § 955. While MSHA does not require States to create remedies for MSHA violations, Congress did not foreclose or prohibit states from providing alternative remedies for violations of its safety standards.

Finally the purported failure of the Department of Labor to enforce MSHA does not support Trinity's argument, particularly as Trinity was sanctioned for this incident. Instead, Texas's failure to require safety standards as stringent as the MSHA regulations operates to frustrate the federal remedial scheme. State compliance is needed to accomplish the plain federal purposes of the Act, namely, to protect all who work on mine property from the

dangers inherent in work that takes place in that venue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

November 5, 2008

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